Joint Statement by the Hon. Anne McLellan, Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness & the Hon. Irwin Cotler, Minister of Justice and Attorney General of Canada

On the Occasion of Appearances before the Senate Special Committee on the Anti-terrorism Act and the House of Commons Subcommittee on Public Safety and National Security

November 14, 2005

Introduction

Canada is not immune from the threat of terrorism. We are a target. Terrorism, as well as other national security challenges, is evolving with ever more complexity and intensity. That is why the Government of Canada enacted the *Anti-terrorism Act* (*ATA*) in 2001. It is our responsibility to protect the safety and security of Canadians. But we also recognized that with this new legislation came a responsibility to assess its need, rationale and operations. That is why a mandatory and comprehensive Parliamentary review after three years was included in the *ATA*.

As the review draws to a close, w e would like to acknowledge and thank each of the Parliamentary committees that are reviewing the *ATA* for their dedication and careful consideration of the *Act* during these last months. We look forward to the reports and recommendations resulting from these detailed examinations of the *Act* and related matters. We are confident that the reports will be made in recognition of the context in which the legislation operates.

We would like to take this opportunity to address a number of issues. First, we will highlight how the *ATA* was framed within a Canadian context and is reflective of our values and expectations. Second, the *ATA*'s necessity and importance as part of our response to the emerging threat environment will be discussed. Third, we will examine the *ATA* within the international context, in particular how it fulfills Canada 's international commitments to counter terrorism. Fourth, we have listened carefully to the concerns expressed by Canadians, particularly through witnesses appearing before the committees reviewing the *ATA* and will address some of the key concerns. Finally, and most importantly, we would like to reiterate our strong and continued commitment to the Act.

The Canadian Context

In 2004, Canada adopted its first National Security Policy, which outlined three core national security interests:

- Protecting Canada and Canadians at home and abroad
- Ensuring Canada is not a base for threats to our allies
- Contributing to international security

It has been crafted to reflect the balance between the need for national security while protecting core Canadian values of openness, diversity and respect for civil liberties. The Government of Canada is committed to preserving these values.

The October 2004 Speech from the Throne underlined that:

> *What makes our communities work is our deep commitment to human rights and mutual respect. The Government is committed to these values.*

The Prime Minister, in his reply to the Speech, said:

> *Let us understand that within our Charter of Rights are enshrined our basic freedoms – and we as a nation of minorities must never allow these fundamental rights to be compromised if we are to protect our national character and our individual freedom.*

The rights and privileges that all Canadians enjoy are at the heart of our ongoing efforts to ensure the security of our people. While we may come from different backgrounds and different cultures, it is our commitments to human rights, multiculturalism and human security that serve as guiding values for our country and unite us as people. These values, which terrorism threatens to undermine, are the values we seek to protect through the *ATA*.

The preamble of the *Act* is clear about protecting fundamental rights and freedoms:

> *"[T]he Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the Canadian Charter of Rights and Freedoms.*

The *ATA*, far from eroding human rights, is based on the principle of human security. While our criminal law has long embraced the principle of human security, the criminal law is not static and unchanging. The practice of terrorism has evolved over time. As terrorists and their methods become increasingly sophisticated, keeping pace with these developments means that our criminal laws must adapt, stressing prevention and deterrence as strategies to combat terrorism.

Canadians realize that the risk of terrorists attacking Canadian targets at home and abroad is an emerging reality. Poll after poll has shown that Canadians, by and large, approve of measures aimed at improving public security. According to Ekos, o ver 90% of Canadians think Canada 's security response to terrorism has either been appropriate or not gone far enough. Almost 60% of Canadians think it is somewhat or very likely that Canada will suffer from a terror attack in the coming year.

A poll conducted by the Strategic Counsel in August 2005 found that only 10% think Canada has put too much emphasis on measures to combat terrorism at the expense of civil liberties. A majority of Canadians (51%) believe that we have struck the right balance between anti-terror measures and protecting civil liberties, while 25% of Canadians believe that too much emphasis has been put on protecting civil liberties.

Yet polling also shows that there remain concerns in the public mind about whether these measures might some day imperil human rights and freedoms. Clearly, Canadians recognize that transnational terrorism is both an overt and an insidious threat to the institutions and values that define our nation. It is equally clear that Canadians expect their government to respond to that danger in a manner that preserves their freedom and security.

We live in a world where terrorists disregard innocent lives and national borders. To ensure that our borders are secure, that we have adequate means to fight terrorism and that we support our intelligence-gathering and evaluation capabilities, we require effective tools and resources to combat terrorism within the rule of law.

The *ATA* was framed with Canadian values in mind. This is expressed in its preamble. The

Canadian public supports specific measures that preserve our security. As the Government, we have a responsibility to respond and the ATA is part of that response.

The Evolving Threat Environment

The global threat environment has not diminished. In fact, it is more fluid and pernicious than ever. The network of terrorists is diffuse and they are less easily identified.

We need the tools to address this evolving threat environment.

We cannot doubt for a moment the determination of terrorists, nor misinterpret any period of calm as marking the end of their violent plans. As we have seen in many cases, attacks are many years in the planning. The hard truth is that the danger has not diminished. We must remain alert – and we must be prepared. And part of being prepared is the implementation of the *ATA*.

All told, there have been more than a dozen significant terrorist attacks around the world in the last seven months, excluding those in Iraq and Israel. Most notable among these – in terms of loss of life - were the July bombing attacks on the London public transit system, the August bombings on tourist facilities in Sharm el Sheikh, Egypt, the suicide bombing attacks, again directed against tourist sites, in Bali, Indonesia in September and, in October, bus bombs in New Delhi, India. Just days ago, we witnessed attacks in Amman, Jordan.

At the same time, law enforcement and security intelligence officials in Canada and elsewhere have managed to foil incidents and disrupt terrorist planning activities.

The motivations behind these attacks have been varied. A recent report published by the Human Security Centre at the University of British Columbia makes three interesting observations:

- that overall, all forms of political violence in the world have declined since the 1990s;
- that the one exception to this has been an increase in international terrorism; and
- that the increase in casualties from international terrorist incidents has been largely due to the growing use of vehicle-borne explosives and suicide bombers.

Following the attacks in London, Al-Qaeda re-issued its list of target countries for action: and for the second time, Canada is named.

Even more disconcerting is that we have seen operational planning and reconnaissance work in some of our major cities. A number of the world's terrorist groups are present in Canada, including those involved in international and domestic extremism. Some engage in extremist activities in Canada, which include fundraising, lobbying through front organizations, providing support for terrorist operations in Canada or abroad, coercing and manipulating immigrant communities as well as other illegal activities.

A number of leading domestic and international experts have testified during the review. Rohan Gunaratna, Associate Professor at the Institute of Defense and Strategic Studies in Singapore and an eminent expert on the international threat environment, appeared before the Senate Special Committee on the *ATA* and stated that:

> *In my opinion, Canada has been a fortunate country for having not suffered a terrorist attack, but of course Canada has been used as an important place by these groups and by their representatives in Canada to raise substantial funds to procure supplies and also to recruit members.*

> *For instance, Mohammed Mansour Jabara, the Canadian citizen of Iraqi-Kuwaiti origin,*

> *who subsequently worked with Khaled Sheikh Mohammed, the 9/11 mastermind, to plan and prepare the terrorist operations in Southeast Asia. We have also seen his brother, Abdul Rahman Jabara, who was killed in Saudi Arabia in 2003. He is also a Canadian citizen of Kuwaiti-Iraqi origin. He was also trained in Afghanistan. Similarly, we have a number of other cases of Canadian nationals going to Afghanistan, receiving this training and participating in terrorist support or operational activity.*

As the Director of Canadian Security Intelligence Service (CSIS) and Professor Gunaratna have both indicated, Canadians have traveled to Iraq to fight with the insurgents. Experience has shown that places such as Iraq are being used as training grounds by extremists for facilitating, networking and the indoctrination of a new generation of terrorists. Iraq is giving a new generation of extremists the means to carry out activities when they return to their countries of origin, including Canada. It should be noted that Al-Qaeda in Iraq has claimed responsibility for the November 9, 2005 bombings in Amman, Jordan.

Some believe that the absence of a terrorist incident in Canada means that the threat of terrorism is not real. This view ignores the facts and disregards the Government's obligation to protect the safety of this country.

Canada, regrettably, had first hand experience with terrorism before 2001, in the Air India bombing of 1985, when 331 people lost their lives in what was then the worst act of aviation terrorism in history.

And certainly with the arrest of Ahmed Ressam in 1999, we learned much more about the extent of terrorist plotting within Canada.

Being prepared, staying ahead of these dangers and preventing their occurrence is what the *ATA* is all about. There can be no unengaged citizens. Every one of us will be called upon to play our part - through greater vigilance, greater patience and continuing resolve.

Our objective in enacting the *ATA* was to create legislation that would place enforcement agencies in a position to apprehend suspected terrorists or disrupt and frustrate their designs *before* they have detonated explosives or boarded airplanes.

Let us be clear: the threat has not diminished. The threat is real. We need the means to counter it.

Canada and the International Efforts to Counter Terrorism

Our security is inextricably linked to that of other states. When other states lack the resources or expertise to prevent and respond to terrorist activity, the security of Canadians and Canadian interests, at home and abroad, is at risk. That is why Canada continues to be an active player in the international struggle against terrorism. The *ATA* parallels actions taken by our international partners to combat this threat, while adopting an approach that reflects Canadian values.

In light of recent and ongoing terrorist attacks around the world, many countries, notably the UK and Australia, as well as international organizations are examining their capacity to address the threat of terrorism and, just like Canada, are reviewing their existing anti-terrorism legislation.

Below we highlight some of the international initiatives to combat terrorism. Clearly, we are not alone in pursuing anti-terrorism initiatives.

The United Nations

The *ATA* implements many of Canada 's international obligations that were established in multilateral anti-terrorism treaties and United Nations (UN) Security Council resolutions.

Throughout the 1990s, the UN and other international bodies were calling on nations to address the terrorist threat. In 1998, Canada signed the *International Convention for the Suppression of Terrorist Bombings* and, in 2000 the *International Convention for the Suppression of the Financing of Terrorism*. By 2001, we had yet to implement those conventions in Canadian law. In part, the *ATA* was inspired by various calls from the international community predating September 11, 2001. Following the events of that day, the UN Security Council adopted *Resolution 1373*, which called on states to take action against terrorism, and terrorist financing and assets in particular. It further called upon states to report within 90 days on the steps they have taken to implement that resolution. Canada has submitted four reports, the last submitted in February 2004.

Most recently, world leaders, including our Prime Minister, met at the United Nations this September on the occasion of World Summit 2005 in New York. They strongly condemned terrorism and welcomed the Secretary General's proposed counter-terrorism strategy. The strategy calls for the promotion of comprehensive, coordinated and consistent responses to terrorism at national, regional and international levels, and also urges states to consider becoming parties to the United Nations' counter-terrorism treaties and protocols.[1] The Prime Minister, along with other delegates, signed the *International Convention for the Suppression of Acts of Nuclear Terrorism*. Recent UN Security Council resolutions, including Resolution 1624 addressing incitement to terrorism, reinforce international efforts to combat terrorism.

Efforts to improve the international anti-terrorism regime continue. Improvements to strengthen the *Convention on the Physical Protection of Nuclear Material* were agreed to by delegates from 89 countries, including Canada, this past July. More recently, Canada joined other countries in amending the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* and its related protocol to address further unlawful acts at sea.[2]

It is essential to recognize that the campaign against terrorism is an international effort. Canada must play its part and the *ATA* accomplishes this goal by reflecting international standards agreed to by United Nations member states.

Recent Initiatives - United Kingdom and Australia

This fall, the British Government tabled its *Terrorism Bill*, which, if and when enacted, will become the *Terrorism Act 2005*. It includes new offences addressing the encouragement (including glorification) of terrorism and the dissemination of terrorist publications. The British House of Commons recently voted on amendments to the *Bill*. The offence of encouragement to terrorism was amended to narrow its scope. The *Bill* had originally proposed to extend the pre-charge detention period from 14 days to 90 days for terrorist suspects. However, a majority of MPs rejected this proposal and instead amended the bill to provide for a maximum pre-charge detention period of 28 days. This power is also subject to a sunset clause. The House of Lords has not yet considered this amended version of the *Bill*.

The Home Secretary also introduced a broad "List of Unacceptable Behaviours" as grounds to exclude and deport individuals from the UK. Such behaviours include "fomenting or glorifying terrorism" and "seeking to provoke others to terrorist acts."

Canada and the UK face many of the same challenges. Canada has discussed some of the lessons learned from the London bombings with British counterparts. Canada is studying these lessons, learned at such a high cost, to see what we can do to enhance the security of our own people and contribute to the greater security of others around the globe. Our officials are also following, with great interest, some of the innovative approaches to community relations undertaken in the UK.

Australia is also following the UK 's lead with the recent introduction of the *Anti-Terrorism Bill (No.2) 2005*. Its new proposals include:

- 12-month control orders for individuals who pose a terrorist risk to the community;

- preventative arrests by the federal police of up to 48 hours duration to restrict the movement of those who would pose a terrorist risk to the community;
- increased stop, question and search powers for law enforcement;
- strengthening existing terrorism financing offences; and
- new criminal offences relating to sedition or inciting violence against the community.

On November 2, 2005, the Australian Prime Minister announced that specific intelligence and police information gave cause for serious concern about a potential terrorist threat. As a result, the government introduced the *Anti-Terrorism Bill 2005* to "strengthen the capacity of law enforcement agencies to effectively respond to this threat." The amendments were being introduced based on the assessment of intelligence agencies "...that a terrorist attack in Australia is feasible and could well occur."

The Australian Bill clarified that, in respect of the existing terrorism offences, it is not necessary for the prosecution to identify 'the' specific terrorist act. Rather, it is sufficient for the prosecution to prove that the particular conduct was related to 'a' terrorist act. The *Anti-Terrorism Act 2005* received Royal Assent on November 3, 2005. Media reports indicate that arrests were made the following week in Sydney and Melbourne during a series of counter-terrorism raids in relation to persons alleged to be planning a terrorist attack in Australia.

Here in Canada, both the departments of Justice and Public Safety and Emergency Preparedness (PSEP) are following international developments closely.

We feel our laws capture what other countries are currently trying to address. For example, Canada's *Criminal Code* includes provisions concerning "counselling a terrorist activity or terrorism offence," which includes incitement to commit offences. The *ATA* enacted into the *Criminal Code* offences such as knowingly facilitating a terrorist activity or knowingly instructing any person to carry out a terrorist activity. The *Criminal Code* offences that prohibit knowingly participating in, facilitating or contributing to an activity of a terrorist group contain clarifications similar to those recently enacted in Australia.[3]

We have no direct Canadian equivalent to the UK 's proposals relating to indirect incitement to commit terrorism, including glorification of terrorism. However, Canada has strong hate propaganda laws and other provisions relating to hate crimes. In addition, Canada has now signed the Council of Europe's *Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*.[4] Signature of this protocol is an important element of Canada's *Action Plan against Racism* and demonstrates our commitment to fighting hate crimes at home and abroad.

The UK is grappling with the issue of the appropriate pre-charge detention period for terrorist suspects. In Canada, the recognizance with conditions provisions in the *ATA* allow peace officers to arrest people without a warrant, in very limited circumstances, for the purposes of bringing an individual before a judge. The purpose and effect of the provision is not to allow for indefinite detention, but to permit a judge to impose conditions considered necessary to prevent a terrorist activity from being carried out.

The use of the recognizance with conditions is only available under strictly-defined conditions and is subject to numerous procedural safeguards. Except for emergency or exigent circumstances, the consent of the Attorney General is required beforehand. Even in emergency situations, this consent will be required after the fact in accordance with the delay prescribed by the ATA. In all cases, an initial judicial hearing must be held within 24 hours, or, if a judge is not available within that time, as soon as possible thereafter. In the event that the recognizance hearing is adjourned by the presiding judge, the *ATA* provides that the length of the adjournment – and therefore the period of further detention - shall not exceed 48 hours. As a result, the maximum detention period pending a recognizance hearing is 72 hours.

Reviews of Anti-terrorism Legislation

Like Canada, other countries are also engaged in parliamentary or congressional reviews of their anti-terrorism legislation. Here are some examples.

In the **United States** various congressional committees have reviewed the *USA PATRIOT Act* in the last six months, and both the House and Senate committees passed bills that would provide that the 16 provisions of the *Act* that are scheduled to sunset on December 31, 2005, be reauthorized. In some cases, it is proposed that provisions are made permanent and, in other cases, that provisions be subject to further sunset clauses. As the two bills differ, a House-Senate conference committee is presently working to iron out these differences.

New Zealand is similarly reviewing its *Terrorism Suppression Act 2002,* which implements UN *Security Council Resolution 1373*. The Select Committee mandated to carry out the review is to report its views to the House of Representatives by December 1, 2005.

In **Australia**, a review of their investigative hearing provisions, which are subject to sunset on July 23, 2006, is under way. A final report is expected at the end of this year. A non-parliamentary committee is also reviewing the operation and effectiveness of Australia 's existing security laws and is expected to conduct public hearings in early 2006.

Like Canada, these countries are reviewing whether there continues to be a need for anti-terrorism legislation similar to the *ATA* and how specific legal provisions address the balance between individual rights and national security.

Many countries, including those who have experienced the devastation of terrorist activities first-hand, are vigorously pursuing mechanisms to address the challenges of an ever changing threat environment. Whether it is through ongoing reviews of existing legislation or through new measures, the international community remains vigilant and attuned to the threat.

The *ATA* meets our needs and we must not diminish our tools when the international community is striving to strengthen its capacity to combat terrorism.

Witness Concerns

We have paid heed to concerns expressed by witnesses who have appeared before both Parliamentary committees. Below we would like to address some of the key concerns pertaining to the *ATA* and other national security issues that have resonated with the committees and the Canadian public. These are as follows:

a. The necessity of the *ATA*
b. Definition of "terrorist activity"
c. Perceptions of racial profiling
d. Listing of entities
e. Security certificates under the *Immigration and Refugee Protection Act*
f. *Canada Evidence Act* amendments
g. *Security of Information Act*, in particular section 4
h. Review of national security actors and the *ATA* itself
i. Sunset clauses

a) The necessity of the ATA

Some witnesses have testified during this review that the measures enacted by the *ATA* were unnecessary - that terrorist offences could have been addressed using existing provisions of the *Criminal Code*. Some have intimated during the review that since we have not frequently used

many of the provisions in *ATA*, we should get rid of certain provisions.

On the other hand, others have mentioned that the *ATA* provides us with essential tools to combat terrorism. For example, during testimony before the Parliamentary review of the ATA, Bill Blair, Chief of the Toronto Police Service, representing the Canadian Association of Chiefs of Police, stated that:

> *Some would argue that the laws are unnecessary because (they are) so seldom required, and as such, we should eliminate the contentious provisions. That would be akin to getting rid of your fire extinguisher because your house never catches on fire. Both notions are sophistries. In a similar vein, it has been a long time since anyone in Canada has been charged with hijacking or treason, and yet it is unthinkable to remove these offences from the Criminal Code, since we (may) need them in the future. The same holds true for the investigative hearing and recognizance with conditions provisions of the Anti-terrorism Act.*

Whether or not the *Criminal Code* measures enacted by the *ATA* are exercised frequently does not in any way diminish their potential to safeguard Canadians.

Many of these provisions are reserved for specific circumstances. They provide law enforcement, and other national security actors, with the vital ability to act quickly should circumstances warrant. This could save lives.

The fact that the provisions are not used frequently is a testament to the careful judgment that has characterised our resort to these measures.

Here are some concrete examples of how the *ATA* has been used:

- The Government has established a list of entities for which there are reasonable grounds to believe they have knowingly participated in or facilitated a terrorist activity. There are currently 38 entities on this list and the process is one that provides an evergreen list of those who might do harm, either directly or indirectly. The legislation requires that the Minister of PSEP review those on the list every two years. The first review has taken place and all entities remain listed.
- One individual has been charged with participating in the activities of a terrorist group under the Criminal Code and this matter is currently before the courts.
- One investigative hearing order was issued in relation to the Air India case. The Supreme Court of Canada determined that the investigative hearing process was constitutional.
- To date, no recognizance with conditions, commonly referred to as preventive arrests, have been issued.
- During the 2004-2005 fiscal year, FINTRAC made 142 case disclosures of financial intelligence on suspected money laundering and terrorist activity financing, involving transactions valued at approximately $2 billion. Of the 142 total disclosures, 32, involving approximately $180 million in transactions, related to suspected terrorist activity financing and/or other threats to the security of Canada. This is up from the previous year when FINTRAC made disclosures worth $70 million relating to terrorism.
- The Minister of PSEP has published annual reports on the use of arrests without warrant under the ATA.
- More recently, the Minister of PSEP published the 2004 Annual Report on Electronic Surveillance, as required by the *Criminal Code*. The report indicates that i n 2004, two authorizations for electronic surveillance were obtained for the following offences:
    - Using or possessing property for terrorist purposes
    - Participation in the activity of terrorist group

- Facilitating terrorist activities
- Instructing to carry out activity for a terrorist group
- Instructing to carry out terrorist activity

The Attorney General of Canada has also published annual reports concerning the use of investigative hearings and the recognizance with conditions provisions of the ATA.

Law enforcement agencies are guided by the ATA when investigating possible terrorism offences. We are convinced that the *ATA* is necessary – views reinforced by leading experts who appeared during the review of the *ATA*.

b) Definition of "terrorist activity"

The *ATA* defines terrorist activity. While the first part of the definition references Canada's international obligations in the fight against terrorism, the second part of the definition of terrorist activity[5] states that a "terrorist activity" may also be an act or omission undertaken, inside or outside Canada, for a political, religious or ideological purpose that is intended to intimidate the public with respect to its security or to compel a person, government or organization to do or refrain from doing any act, and that intentionally causes specified forms of serious harm. These harms are causing death or serious bodily harm, endangering life, causing a serious risk to health or safety, causing substantial property damage where it would also cause one of the other listed harms, and, in certain circumstances, causing serious interference or disruption of an essential service, facility or system, whether public or private. The definition further makes clear that a protest or strike is excluded from the definition of "terrorist activity" unless it intentionally causes death or bodily harm, endangers life, or causes a serious risk to health or safety. As well, the expression of religious beliefs or political opinions alone is not considered a "terrorist activity."

Some witnesses have testified that they are concerned the definition of terrorist activity in the *ATA* is too vague and imprecise.

Others maintain that the qualifiers "political, religious or ideological purpose, objective or cause" encourage the deliberate targeting of ethnocultural and religious groups by law enforcement and security intelligence officials. They have suggested that their concerns might be addressed by removing the motive requirement from the definition of terrorist activity in the *Criminal Code* or by referring to language in the *International Convention for the Suppression of the Financing of Terrorism*.

The definition of terrorist activity targets criminal activity not any particular group. The *ATA* does not criminalize political, religious or ideological activities in and of themselves. It addresses only actions of extreme harm that are undertaken for political, religious or ideological purposes and which fall under the *Criminal Code* definition of "terrorist activity".

It should be noted that the qualifiers, "for a political, religious or ideological purpose, objective or cause," commonly referred to as the motive requirement, have been incorporated in anti-terrorism legislation in other Commonwealth countries including the UK, Australia, South Africa and New Zealand.

We believe the motive requirement is important to define terrorist activity for the following reasons:

- This motive requirement recognizes the unique nature of terrorism as a phenomenon that has stated ideological, political or religious dimensions, and seeks to achieve its ends by terrorizing the public and government through violence or creating the apprehension of harm.

- The motive requirement functions as words of limitation. The requirement that the acts or omission were committed for a religious, political or ideological purpose is to be proven by the prosecution and helps to distinguish terrorist activity from other forms of criminality, including organized crime, that are intended to intimidate people by the use of violence. These words of limitation ensure that the various special investigative and other provisions that we see as appropriate in the fight against terrorism do not apply to these other forms of criminality. It can also help prevent a terrorism conviction for actions otherwise having no religious, political or ideological purpose.
- The motive requirement is not designed to stigmatize or single out people on the basis of their religion, their political beliefs or their ideologies; rather the words must be read against the rest of the clause, which speaks in terms of an intention to intimidate the public or a segment of the public.
- The *ATA*'s interpretive clause reads as follows:

> *For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition 'terrorist activity' in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.*

This clause seeks to ensure that law enforcement cannot target beliefs alone and that courts cannot effectively criminalize them in an overly broad interpretation of the definition of terrorist activity.

We believe for these reasons that the motive requirement in the definition of terrorist activity provides the necessary words of limitation to target terrorist acts.

c) Perceptions of Racial Profiling

Various witnesses have raised concerns that the *ATA* generally legitimizes racial profiling by law enforcement and security intelligence officials. For example, some community representatives have indicated that they have been asked inappropriate questions about the practice of their religion by law enforcement and intelligence officials. They also maintain that individuals have been discouraged from having legal representation with them during questioning by law enforcement and intelligence officials.

As discussed above, other witnesses have pointed to the motive requirement in the definition of terrorist activity as contributing to this concern.

Others believe that adding a non-discrimination clause in the *ATA* would mitigate some of the concerns regarding allegations of racial profiling.

We take these concerns very seriously. The Government of Canada does not condone, tolerate or sanction racial profiling. Racial profiling is morally and legally unacceptable. From a practical standpoint, it is detrimental to counter-terrorism efforts because it shifts the focus away from the illicit *activity*.

If individuals have complaints regarding actions of law enforcement and security intelligence personnel, we have robust independent review and accountability mechanisms in place. They are there to be used.

There are a number of other concrete steps we are taking to address these concerns. We recognize that a key challenge for governments is to explain and to consult with members of society on national security policies. In today's complex security environment, an engagement between government and citizens should be viewed as an ongoing dialogue – intelligence and law

enforcement agencies cannot afford to alienate or isolate any community groups.

Some of the initiatives that we have taken to address concerns are:

- The Canada Border Services Agency's (CBSA) Fairness Initiative.
- The Royal Canadian Mounted Police's (RCMP) soon to be released Bias-Free Policing Policy;
- The Cross-Cultural Roundtable on Security, created in February 2005. The Senate Committee has already heard from the Chair of the Roundtable, Dr. Lakhani, about its work, mandate and challenges. We would like to reiterate our commitment and support of the Roundtable and we look forward to working with its members to continue the dialogue with Canadians on national security issues.
- Ongoing consultations and community engagement activities. Last November, the Departments of Justice and PSEP held a one-day consultation with representatives from a cross-section of ethnocultural and religious groups regarding the impact of the *ATA* on their communities.
- PSEP portfolio agencies – such as the CBSA, RCMP and CSIS - have undertaken numerous community outreach activities in recent months. In our roles as the Minister of Justice and Attorney General of Canada and the Minister of PSEP, and through our Parliamentary Secretaries, we continue to meet with members of ethnocultural and religious groups and other non-governmental organizations to discuss their concerns.
- The National Action Plan against Racism represents Canada 's commitment to combat racism and racially based discrimination, including perceptions of racial profiling. The Government of Canada is committed to ensuring that discriminatory practices have no place in the public safety context, and that minorities are not singled out for discriminatory treatment. The Action Plan's ultimate goal is to eliminate racism altogether. The Department of Justice, in cooperation with other federal departments and agencies, has been given the responsibility for three initiatives: Race-Based Issues in the Justice System; Interventions for Victims and Perpetrators of Hate Crimes; and Countering Internet-Based Hate Crime. As part of the examination of race-based issues in the justice system, Justice officials are working with PSEP and other departments to look at options to find concrete measures that can prevent discrimination and promote security for all.

We are committed to ensuring that the *ATA* does not have a discriminatory impact on members of ethno-cultural and religious minorities.

Our underlying message is clear: the principle of equality before the law remains fundamental to our justice system. We desire a Canada where there is no sanctuary for hate or racism.

d) The Listing of Entities

The ATA created a way to publicly identify groups or individuals associated with terrorism through its "listing" provisions. This helps to prevent terrorists from accessing certain assets, raising funds and establishing a base here in Canada. The listing provisions were also created to help give effect to our international obligations.

The legislation provides for the Governor-in-Council to establish, by regulation, a list on which it may place any entity, on the recommendation of the Minister of PSEP. The recommendation is based on reasonable grounds to believe that the entity knowingly meets the threshold.[6]

Some witnesses have expressed concerns that there are insufficient safeguards in the listing process – both prior to and after being listed. They have also commented that the threshold to list an entity "based on reasonable grounds to believe" is too low.

The listing process has a number of safeguards. Application can be made for review of the decision

to list, first to the Minister of PSEP and then to the judiciary. There is a specific procedure to protect those who may be mistakenly identified as a listed entity. As well, the list of entities must be reviewed two years after its establishment and every two years thereafter.

Canada is committed to taking all necessary steps as part of the international effort to bring terrorists to justice and to ensure terrorists are denied access to funding. The listing of entities is an important part of that ongoing effort. The fact that an entity is listed establishes it as a terrorist group.

It is important to emphasize that being on the list does not itself constitute a criminal offence, although it can lead to criminal consequences. The list supports the application of other provisions in the Act, including:

- terrorism offences;
- crimes relating to the financing of terrorism;
- requirements to freeze terrorist property and procedures for the courts to order seizure and forfeiture of that property; and
- the removal or denial of the charitable status of organizations that engage in or support terrorism.

Terrorist organizations from all parts of the globe, of varying sizes and various stripes, have set their sights on prosperous western nations, like Canada, to further their activities. The listing process assists us in combating them.

The Government of Canada listed a total of 38 entities that it has determined to be knowingly engaged in terrorist activity.

e) Security Certificates under the Immigration and Refugee Protection Act

There has been significant debate, during the ATA review as well as in the media, concerning the security certificate process governed by the *Immigration and Refugee Protection Act* (IRPA).

A security certificate provides the Government of Canada with the means to remove a non-citizen who poses a danger to the public or the security of Canada. It is only used for individuals who present the highest level of risk. The risk assessment is based on information that needs to be protected for reasons of national security or if a person's safety is at risk.

Security certificates are an exceptional measure that are employed judiciously and their issuance is based upon a thorough process with heavy reliance on the judicial system.

A few statistics about the process:

- It has been in existence for over 20 years.
- Since 1991, only 27 certificates have been issued, though Canada removes approximately 9,000 people per year.
- Only five security certificates have been issued since September 11, 2001.
- Currently in Canada, security certificates have been issued against six individuals.
- Of the six, four individuals are held in detention and two are released on conditions.

The following concerns about security certificates have been raised by a number of witnesses in the course of the *ATA* review:

- that the process is secret;
- that the conditions of detention of the four individuals in custody are problematic;
- that Canada is not in compliance with its international obligations by removing individuals to a place where they may face a substantial risk of torture; and
- that the process should be abolished.

Let us squarely address these misconceptions.

First, regarding the "secret" nature of the security certificate process, it should be reiterated that the judge examining the matter reviews all the evidence. In turn, it is the judge who determines which of that evidence may be shared publicly by way of an unclassified summary. That information is provided to the individual. The summary must include sufficient information to enable the individual to be reasonably informed of the circumstances giving rise to the certificate, but it does not include anything, in the opinion of the judge, that would be dangerous to national security or the safety of any person if disclosed. The individual is therefore aware of the allegations against them.

The judge will also hear evidence and testimony from the person named in the certificate before ruling on whether a certificate should be upheld or not. The person may also call witnesses to testify on their behalf.

Second, we have taken measures to address the conditions of detention of the four individuals in custody. It has become increasingly difficult to meet the requirements of security certificate cases in provincial facilities. As a result of discussions with the Ontario government, a decision has been made to transfer the detention of these security certificate cases from Ontario detention centres to a federal detention facility. The establishment contemplated will be a federal property in Ontario that has the necessary and appropriate infrastructure. It is estimated that a federal facility will be ready to detain the security certificate cases in the upcoming months.

As part of the immigration process, it is our intent to remove these individuals from Canada and in light of the risks they present, to keep them detained until then. In the meantime, they have chosen to exhaust all legal avenues to avoid deportation, as is their right. They can, and always have been able, to leave the country at any time. They are detained solely by virtue of their refusal to leave Canada.

Third, with regards to the issue of non-removal of security certificate cases based upon a substantial risk of torture in their country of origin the Supreme Court of Canada articulated its position in the *Suresh* case. As a government, we carefully balance the rights of the individual with the interest of national security.

This is a global challenge and not simply one within our own context. These are difficult issues. Our system incorporates due process even for the most extreme cases and seeks to strike a careful balance between the rights of individuals and the protection of society against threats to our safety and security.

Finally, the security certificate regime is required to protect the safety and security of Canadians. The Government has a responsibility to take action against those individuals currently in or who attempt to enter Canada and who present a serious risk to national security. Over the decades, our courts have examined elements of the security certificate process and have repeatedly upheld them as constitutional. Recently, the Supreme Court of Canada granted leave to review the constitutionality of the IRPA security certificate process. We look forward to the Supreme Court's decision and we welcome the views of the committees on this matter as well.

f) *Canada Evidence Act* Amendments

The *ATA* amended the *Canada Evidence Act* to improve the use of sensitive or potentially injurious information in proceedings. It provides for the protection of information that would be injurious to international relations, national defence or national security, it introduces greater flexibility into the system and offers the opportunity for evidentiary issues to be resolved early in proceedings.

More specifically, the intent was to make sensitive or potentially injurious information available for use in proceedings in ways that would serve the public interest in both the disclosure and protection of information. To this end, the legislation clearly contemplates not just the stark choice of disclosing all or none of the information, but provides for a menu of judicial options, including the provision of summaries and agreed statements of facts.

Through this regime, the Government of Canada can assure its allies that it can protect sensitive and potentially injurious information that it has obtained from them. After an order or decision that would result in the disclosure of foreign information has been made, the Attorney General of Canada can personally issue a certificate. The use of the Attorney General's certificate is anticipated only in the rarest of cases and, to date, no such certificate has been issued.

In the overall context of protecting the security of our country, we rely on information coming from foreign partners or confidential sources. Information falling into these categories is often sensitive and must be protected. We have to recognize that there are groups and individuals that would like to do us harm and that they will not hesitate to use sensitive information to do so.

We have listened carefully to views of witnesses expressed about this regime and we are now exploring ways to respond to some of these concerns. In particular, the Government of Canada is reviewing the requirement to hold hearings in private. As the Supreme Court of Canada has recognized, there are circumstances that justify holding proceedings in private. However, in recent cases such as *Ruby* and *Reference re s. 83.28 of the Criminal Code*, the latter of which upheld the constitutionality of the investigative hearing provision, the Court strongly supported holding hearings in open court, even in light of national security considerations. Therefore, we are examining ways for the *Canada Evidence Act* to better reflect the balance that the Supreme Court has articulated.

g) The Security of Information Act (SOIA), including section 4

Witnesses have testified before you regarding the *Security of Information Act*, which aims to preserve the confidentiality of certain government held information and to ensure the proper working of government by focusing on information-related conduct likely to harm Canada. Consistent with the goals of the *ATA,* the amendments that created the *SOIA* were focused on terrorist and foreign threats to Canadian security.

The House Subcommittee specifically added review of section 4 of the *SOIA* into its mandate. This provision deals with the wrongful communication, use, reception, retention and failure to take reasonable care of certain government information. It was essentially unchanged by the ATA, which specifically focused on terrorist and foreign threats to Canadian security, and on provisions to meet those threats. Therefore, the ATA did not address the wrongful communication, etc of government information more generally, as contained in the original section 4 of the Official Secrets Act.

As the Minister of Justice stated in his initial appearance before the House Subcommittee, the Government of Canada recognizes that section 4, which was largely not amended under the new *SOIA*, needs to be reviewed and modernized. While there is scope for the courts to interpret section 4 properly, the Government is of the view that it is appropriate for Parliament to have the opportunity to consider many of the policy issues raised by section 4, and the *SOIA* as a whole. The Minister of Justice provided the committees with an issues paper prepared to assist in this regard. We look forward to the views of the committees on these issues.

h) Review of National Security Activities and the ATA itself

Many witnesses that have come before the Committees have called for increased review and oversight of Canada 's national security apparatus. Some have expressed concern that the information sharing practices of the state constitute a major threat to individual rights and lack safeguards and review mechanisms. Others perceive that, since 9/11, the extensive investment in Canada's national security apparatus has lacked the corresponding means to account for the authority, power and the resources provided.

Information sharing is the life-blood of law enforcement and intelligence agency work. To not fully explore all intelligence leads or avenues and miss a key piece of intelligence could have devastating consequences for Canada.

That said, because sharing information or intelligence can also have consequences for the individuals concerned, our agencies are judicious about the nature and purpose of the information they may share about our own country's citizens and residents. Information sharing is done strategically, not indiscriminately.

Information must be gathered and shared under accepted protocols, with appropriate caveats, t o ensure the protection of privacy and human rights and to consider to how the information is used. These protocols and caveats further determine how the recipient agency or country may use this information and whether they can in turn share it with others. In addition to statutory requirements, there is ministerial direction for both CSIS and the RCMP that governs information sharing arrangements with foreign organizations.

It is indispensable for our national security agencies to share information if we are to adequately respond to the evolving threat environment. Sharing of intelligence is of paramount importance to manage risks effectively. We cannot afford to work in silos, a concern expressed in the *9/11 Commission Report*. The repercussions of such methods of operations are both devastating and obvious. However, we recognize that with increased information sharing comes an increased concern about the effect on individual privacy.

Canada reviews national security activities, including information sharing, at multiple levels including judicial, parliamentary and executive oversight, and independent mechanisms such as the Security Intelligence Review Committee and the Commission for Public Complaints against the RCMP.

Moreover, sunset clauses, annual reports, Parliamentary reviews and a host of other safeguards ensure that Canadians are aware of, and engaged in, the process of keeping Canada safe from terrorism while protecting our fundamental rights.

Any consideration of review mechanisms and reporting requirements must adequately consider the important and, in some cases, fundamental differences in mandates and operations of departments and agencies in the security intelligence community. They are therefore subject to varying review mechanisms and reporting requirements.

The Government has also asked the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar to make recommendations concerning an independent, arm's-length review mechanism for the RCMP's activities with respect to national security. We look forward to the Commission's recommendations on this matter. Furthermore, t he Government is committed to strengthening dialogue with Parliamentarians on national security matters. The creation of a National Security Committee of Parliamentarians is close to realization.

i) Sunset Clauses

The Government has supported this review. It permits democratic debate on the important public

policy issues that underlie the *ATA*– namely what powers are necessary to protect the safety and security of Canadians and what safeguards are needed to protect their rights and freedoms.

The preventive arrest and investigative hearing powers are due to be reviewed soon. Under the sunset clauses that apply to them, these powers will cease to apply at the end of the 15th day of Parliament after December 31, 2006, unless a resolution is passed by both the House of Commons and Senate to extend either or both of these powers for a period of up to five more years.

This review and the upcoming parliamentary debates on the sunset clauses are two important opportunities for Parliament to debate the complex public policy issues that the *ATA* raises.

As mentioned, we are of the view that the investigative hearing and recognizance with conditions provisions of the ATA remain important tools for our domestic law enforcement agencies and prosecutors as they act to prevent, and prosecute, terrorism. To date, only one order for an investigative hearing has been sought and that was in the context of the Air India prosecution. These provisions, while needed, remain largely untested. For that reason, we believe there should be a further extension of the sunset clauses that apply to these provisions.

Conclusion

There are those who would be content to say a terrorist event won't happen here. Given our experience with the Millennium Bomber and the Air India tragedy, to name but a few, and with the evolving threat environment, we find this troubling. This review is an opportunity not only to consider the threat facing us today but also how we will deal with the threat five to 10 years from now. Dedicated terrorists have demonstrated remarkable patience in plotting and planning.

We take seriously our commitment to protecting both Canada and Canadian interests from threats of terrorism. As we indicated at the outset, we are equally committed to doing so in accordance with the rights and privileges that all Canadians enjoy and that are enshrined in the *Canadian Charter of Rights and Freedoms.* They are at the heart of our ongoing efforts to ensure the security – the human security - of our people.

It is important for Canada to review continuously the measures we take to combat terrorism. The threat environment in Canada and around the world is constantly and rapidly changing. That is why the testimony of witnesses, along with the wealth of research, debate, deliberation and input from members of these committees reviewing the *ATA* is valuable.

The ultimate responsibility for protecting Canadians falls to government and we will continue to do all that is reasonable and just to fulfill that most fundamental of government responsibilities.

We owe it to the world to ensure that Canada is not a haven for terrorists. Dealing with this requires the range of tools set out in our laws. The Government of Canada does not intend to repeal the ATA.

It may be amended, refined and modified as circumstances require. We are relying on the Committees' recommendations to provide practical guidance as to whether this is necessary and, if so, how this can be accomplished. We look forward to the committee reports.

[1] http://untreaty.un.org/English/Terrorism.asp (United Nations Conventions on Terrorism)

[2] http://www.imo.org/home.asp (International Maritime Organization)

[3] See ss. 83.18(2) and 83.19(3) of the *Criminal Code.*

[4] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?

NT=189&CM=8&DF=23/10/2005&CL=ENG (Council of Europe Treaty Office)

[5] See paragraph 83.01(1)(b)(i)(A) of the *Criminal Code*

[6] See s. 83.05(1) of the *Criminal Code*.

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